



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FIRST CLASS MAIL

Lyn Utrecht, Esq.
Ryan, Phillips, Utrecht & Mackinnon
1133 Connecticut Avenue, NW
Washington, DC 20036

NOV 19 2007

RE: MURs 5440 and 5755

Dear Ms. Utrecht:

On October 20, 2004 and June 10, 2005, your client, New Democrat Network, was notified that the Federal Election Commission found reason to believe that NDN Political Fund violated 2 U.S.C. §§ 433, 434, 441a(f) and 441b(a), provisions of the Federal Election Campaign Act of 1971, as amended, or, in the alternative, that New Democrat Network and Simon Rosenberg, in his official capacity as treasurer, violated 2 U.S.C. §§ 434, 441a(f), and 441b(a) and 11 C.F.R. §§ 102.5, 104.10, 106.1 and 106.6 by failing to allocate certain expenses. The Commission subsequently conducted an investigation and severed these allegations into a new matter, MUR 5755. After considering the circumstances of this matter, however, the Commission determined to exercise its prosecutorial discretion and take no further action on November 14, 2007.

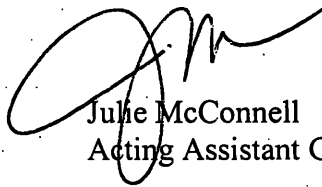
At the same time, in MUR 5440, the Commission found no reason to believe that New Democrat Network and Simon Rosenberg, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(a)(1) by making and failing to report excessive contributions in the form of coordinated communications to DNC Services Corporation/Democratic National Committee and Andrew Tobias, in his official capacity as treasurer, or to John Kerry for President, Inc. and Robert Farmer, in his official capacity as treasurer. Accordingly, the Commission closed the file in both matters on November 14 and 16, 2007. The Factual and Legal Analysis explaining the Commission's decision is enclosed.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003).

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If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read 'Julie McConnell', is written over the printed name.

Julie McConnell
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

MURs 5440 and 5755

Respondent: New Democrat Network and Simon Rosenberg, in his official capacity
as Treasurer

I. MUR 5755

A. BACKGROUND

This matter centers on allegations that NDN Political Fund ("NDN") is a political committee under the Federal Election Campaign Act of 1971, as amended ("the Act"), and failed to register and report with the Commission and to comply with the Act's contribution limits and source prohibitions. See 2 U.S.C. §§ 434, 441a(a)(1)(C) and 441b(a). In its response to the complaint, NDN asserted that it was a *bona fide* membership organization with a separate segregated fund ("SSF"), rather than a political committee, because it did not meet the statutory threshold for political committee status or have as its major purpose the nomination or election of federal candidates.

Because of NDN's affiliation with a federal political committee, New Democrat Network – PAC ("NDN PAC"), the Commission found reason to believe that NDN and NDN PAC were operating as a single political committee with federal and non-federal accounts, and had violated the Act by failing to allocate federal funds to pay for advertisements that promoted, supported, attacked or opposed President Bush. The Commission subsequently made supplemental reason to believe findings that NDN violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register and report as a political committee and continued the investigation on alternative theories.

1 Based on the information obtained in the course of the investigation, the Commission
2 takes no further action as to New Democrat Network and Simon Rosenberg, in his official
3 capacity as Treasurer, and closes the file in this matter.

4 **B. FACTS**

5 NDN is organized under Section 527 of the Internal Revenue Code. At the time of the
6 activity investigated in this matter, NDN was structured as a membership organization with a
7 SSF, NDN PAC.¹ During the 2004 election cycle, the website shared by NDN and NDN PAC
8 stated that the organization's mission was to elect "public servants at all levels of government
9 who believe that the Democratic Party needs to find ways to lead our country into a new era
10 while holding true to our most cherished values." In furtherance of this goal, NDN endorsed and
11 made contributions to state and local candidates, while NDN PAC, a multicandidate committee,
12 endorsed and contributed to federal candidates. Since 1996, NDN and NDN PAC have endorsed
13 400 nonfederal candidates, while NDN PAC and NDN's former federal account have endorsed
14 125 federal candidates.²

15 During the 2004 cycle, NDN spent a total of \$12,524,063, including approximately \$5.8
16 million for the production and placement of three media campaigns consisting of 37 television,

¹ New Democrat Network ("NDN") has restructured three times in the past ten years. Between 1996 and 2003, it was a political committee with federal and nonfederal accounts. Under this structure, NDN was the subject of an audit of 2002 cycle activity. See A03-45, Report of the Audit Division on the New Democrat Network (Feb. 24, 2006). NDN reorganized in February 2003. During the 2004 election cycle, the former nonfederal account, NDN, served as the connected organization of a new separate segregated fund, NDN PAC. The former federal account (Committee ID C00319772) remained registered with the Commission but disclosed no activity for the 2004 cycle, and only \$327 cash on hand and \$1.049 in debts for the 2006 cycle. NDN again reorganized in December 2004. In its current form, NDN is a 501(c)(4) advocacy organization that serves as the connected organization for NDN PAC, with NDN as an affiliated 527 organization.

NDN has attempted to terminate both its former federal account and NDN PAC, but has been unable to do so because of the audit of its 2002 cycle activity and this enforcement matter.

While NDN PAC was primarily responsible for endorsing federal candidates, it also appears to have paid some expenses associated with state and local candidate endorsements.

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1 radio, and Internet advertisements.³ Specifically, NDN funded a variety of issue advocacy
2 advertisements, including four advertisements criticizing the Republican candidate or praising
3 his Democratic opponent in the Kentucky gubernatorial race; a series of Spanish-language
4 television, radio, and Internet advertisements directed at Hispanic voters in states with a
5 substantial Hispanic population, including Florida, Arizona, Nevada, New Mexico, Colorado,
6 Pennsylvania, and Wisconsin; and television advertisements aired in three Western states that
7 criticized Republican handling of the economy. Many of these advertisements had no references
8 to federal candidates, but were instead aimed at promoting the Democratic "brand" among
9 Hispanic and Latino voters and voters in Alaska, Oklahoma, and Colorado.

10 Similarly, membership solicitations obtained from NDN and five large donors included
11 no references to federal candidates. A representative e-mail solicitation sent to prospective
12 members requested money to "create our successful media campaigns, advocate for our powerful
13 agenda, support the best candidates in the toughest races across the country, and launch efforts to
14 meet the conservative challenge by building a new progressive infrastructure."
15 Membership renewal notices asked members to donate to fund NDN's efforts "to fight for our
16 values and our modern agenda," "expand[] its sophisticated, aggressive and sophisticated ad
17 campaign aimed at the Hispanic Community," and "respond to the conservative message
18 machine and... build our own robust progressive infrastructure."

19 According to Rosenberg, his oral fundraising solicitations to prospective
20 donors closely followed the language in NDN's public communications and e-mail solicitations.

³ In addition, based on IRS reports, NDN contributed approximately \$137,200 to state and local candidates and spent approximately \$886,623 on polling during the 2004 cycle, with the remainder of its disbursements for consulting, research and administrative expenses. Forms 8872 and 990; see also 2003 Expenditure by Class, AR 0171; 2004 Expenditure by Class.

Indeed, documents and interrogatory responses obtained from five

large donors revealed no references to federal candidates in NDN's oral or written solicitations.

C. ANALYSIS

Evidence uncovered during the investigation does not support proceeding on any theory of liability. At issue is whether NDN failed to register and report with the Commission as a

political committee and to comply with the Act's contribution limits and source prohibitions or,

in the alternative, operated as a political committee with federal and nonfederal accounts and

failed to allocate expenditures for certain communications between these accounts. As discussed

above, NDN focused the vast majority of its media spending on generic, party-building

advertisements. Only one advertisement produced by NDN, the "Nombre" advertisement, might

be subject to the reach of 11 C.F.R. § 100.22(b). Further, NDN's fundraising solicitations

contained no references to federal candidates. Thus, the evidence does not clearly establish that

NDN met the statutory threshold for political committee status, or that it had the nomination or

election of a federal candidate as its major purpose. In addition, because NDN was a

membership organization with a SSF during the 2004 election cycle, rather than a political

committee with federal and nonfederal accounts, allocation is not a viable, stand-alone theory.

As a result, the Commission exercises its prosecutorial discretion and takes no further action in this matter.

(1) Political Committee Status

Any organization that receives contributions or makes expenditures in excess of \$1,000 during a calendar year and whose major purpose is the nomination or election of a federal

candidate, or which is under the control of a federal candidate, qualifies as a political committee.

See 2 U.S.C. § 431(4)(A); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976) ("*Buckley*"); *FEC v.*

1 *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249, 253 n.6 (1986) (“MCFL”); *see also*
2 Defendant’s Motion for Summary Judgment, *EMILY’s List v. FEC*, Civ. No. 05-0049, at 33
3 (D.D.C. Oct. 9, 2007).

4 (a) Evidence Obtained During the Investigation is Insufficient to
5 Establish that NDN Made Expenditures

6 The Supreme Court has interpreted the term “expenditure,” for communications made
7 independently of a candidate or candidate’s committee, to include only “expenditures for
8 communications that in express terms advocate the election or defeat of a clearly identified
9 candidate for federal office.”⁴ *Buckley*, 424 U.S. at 14; Supplemental Explanation and
10 Justification, Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007). Under the
11 Commission’s regulations, a communication contains express advocacy when it uses phrases
12 such as “vote for the President,” “re-elect your Congressman, or “Smith for Congress,” or uses
13 campaign slogans or individual words, “which in context can have no other reasonable meaning
14 than to urge the election or defeat of one or more clearly identified candidate(s)....” *See* 11
15 C.F.R. §100.22(a); *Buckley*, 424 U.S. at 44 n.52; *see also* *MCFL*, 479 U.S. at 249.

16 The second part of this regulation encompasses a communication that, when taken as a
17 whole or with limited reference to external events, “could only be interpreted by a reasonable
18 person as containing advocacy of the election or defeat of one or more clearly identified
19 candidate(s) because” it contains an “electoral portion” that is “unmistakable, unambiguous, and
20 suggestive of only one meaning” and “reasonable minds could not differ as to whether it
21 encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages
22 some other kind of action.” *See* 11 C.F.R. §100.22(b). In its discussion of then-newly

⁴ Certain other activities, such as GOTV and ballot access, also may qualify as expenditures under the Act, even when made independently of a candidate or candidate’s committee. *See, e.g.*, AO 2006-20 (Unity 08).

1 promulgated section 100.22, the Commission stated that "communications discussing or
2 commenting on a candidate's character, qualifications or accomplishments are considered
3 express advocacy under new section 100.22(b) if, in context, they have no other reasonable
4 meaning than to encourage actions to elect or defeat the candidate in question." *Express*
5 *Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed.
6 Reg. 35292, 35295 (July 6, 1995).⁵

7 It could be argued that the "Nombre" advertisement at issue in this matter may fall within
8 the regulatory reach of 11 C.F.R. § 100.22(b). It is entirely candidate-centered, and it alleges
9 that President Bush received preferential treatment during Vietnam and favored specific interests
10 for improper or insufficient reasons. It also refers to several issues and does so only in the
11 context of attacking President Bush in the eight weeks preceding the 2004 Presidential election.
12 The advertisement may also include a reference to the election ("Beware this is not the end"
13 combined with a close-up image of President Bush), and it directs the viewer to "listen to what I
14 say," "Beware of the name Bush," "Be careful, Iraq is a failure," and "Join the Democratic
15 Movement."

16 Proceeding with further investigation and enforcement against an organization for a
17 single advertisement that only arguably falls within 11 C.F.R. § 100.22(b), however, is not the
18 best use of the Commission's resources, particularly given that the Commission has an ongoing
19 rulemaking to address the impact of *WRTL II* on this regulation. See *Electioneering*
20 *Communications*, 72 Fed. Reg. 169 (Aug. 31, 2007). Because no other communications publicly

⁵ In *FEC v. Wisconsin Right to Life*, 127 S.Ct. 2652, 2667 (2007) ("*WRTL II*"), the Supreme Court held that "an ad is the functional equivalent of express advocacy," and thus constitutionally regulable as an electioneering communication under 2 U.S.C. § 441b(b)(2), if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." The Court examined whether the advertisement had "indicia of express advocacy" such as the "mention [of] an election, candidacy, political party, or challenger" or whether it "take[s] a position on a candidate's character, qualifications, or fitness for office." *Id.*

1 disseminated by NDN even arguably fall within the ambit of 11 C.F.R. § 100.22, the evidence
2 obtained during the investigation is insufficient to establish that NDN made "expenditures"
3 under the Act.

4 (b) NDN Did Not Receive Contributions under the Act

5 Solicitations clearly indicating that the funds received will be used to target the election
6 or defeat of a clearly identified candidate for federal office will result in contributions under the
7 Act. *See* 2 U.S.C. § 431(8)(A); *see also* *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285, 295 (2d
8 Cir. 1995).

9 The Commission uncovered no membership or fundraising solicitations clearly indicating
10 that the funds received would be used to target the election or defeat of a clearly identified
11 federal candidate. Indeed, the membership solicitations obtained from NDN and five large
12 donors included no references to federal candidates. A representative e-mail solicitation sent to
13 prospective members requested money to "create our successful media campaigns, advocate for
14 our powerful agenda, support the best candidates in the toughest races across the country, and
15 launch efforts to meet the conservative challenge by building a new progressive infrastructure."

16 Membership renewal notices asked members to donate to fund NDN's efforts
17 "to fight for our values and our modern agenda," "expand[] its sophisticated, aggressive and
18 sophisticated ad campaign aimed at the Hispanic Community," and "respond to the conservative
19 message machine and... build our own robust progressive infrastructure."

20 In addition, documents and interrogatory responses obtained from five
21 large donors revealed no references to federal candidates in NDN's oral or written solicitations.
22 As a result, NDN did not receive contributions that would trigger registration and reporting
23 requirements as a political committee.

(c) NDN Does Not Meet the Major Purpose Test

To address overbreadth concerns, the Supreme Court has held that only organizations whose major purpose is campaign activity can potentially qualify as political committees under the Act. *See Buckley*, 424 U.S. at 79; *MCFL*, 479 U.S. at 262. The Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act. *See Political Committee Status: Supplemental Explanation and Justification*, 72 Fed. Reg. 5595, 5597, 5601 (2007).

As discussed above, the vast majority of NDN's advertisements had no references to federal candidates, but were instead aimed at promoting the Democratic "brand" among Hispanic and Latino voters and voters in Alaska, Oklahoma, and Colorado. Moreover, NDN spent approximately \$40,682, or less than one percent of its total disbursements, to produce and place the "Nombre" advertisement on two Spanish-language websites. *See* Letter from Lyn Utrecht to Julie McConnell (Jun. 22, 2006); Similarly, NDN's solicitations demonstrated no federal major purpose, but rather requested money to "create our successful media campaigns, advocate for our powerful agenda, support the best candidates in the toughest races across the country, and launch efforts to meet the conservative challenge by building a new progressive infrastructure," "to fight for our values and our modern agenda," "expand[] its sophisticated, aggressive and sophisticated ad campaign aimed at the Hispanic Community," and "respond to the conservative message machine and... build our own robust progressive infrastructure." Given these facts, it is implausible that the major purpose of NDN was the nomination or election of federal candidates.

For all the foregoing reasons, the Commission declines to move forward on a political committee theory as a matter of prosecutorial discretion. *See Heckler v. Chaney*, 470 U.S. 821

1 (1985). For the same reasons, the Commission does not pursue an alternative corporate
2 expenditure theory.

3 (2) Allocation

4 The evidence does not support proceeding on an allocation theory. During the
5 2004 cycle, NDN was organized as a membership organization with a SSF. Members paid a \$35
6 annual membership fee and, in return, were given access to conference calls and members-only
7 events and the opportunity to provide input on substantive decisions, such as the selection of
8 candidates to be endorsed by NDN and NDN PAC and the composition of the organization's
9 policy agenda.⁶ In addition, according to Rosenberg, NDN PAC paid for the costs of endorsing
10 federal candidates and reimbursed NDN for expenses related to the federal portion of the
11 website. See Rosenberg ROI at 4. Thus, because information obtained during the investigation
12 indicates that NDN was a valid membership organization under 11 C.F.R § 100.134(e), rather
13 than a political committee with federal and nonfederal accounts, allocation is not a viable basis
14 for proceeding in this matter.

15 (3) Conclusion

16 Accordingly, the Commission exercises its prosecutorial discretion and takes no further
17 action as to NDN Political Fund, formerly known as New Democrat Network and New
18 Democrat Network – Non-Federal Account; New Democrat Network – PAC; New Democrat
19 Network, the inactive Federal Account registered as Committee ID C00319772; and Simon
20 Rosenberg, in his official capacity as treasurer of both committees, and closes the file in MUR
21 5755.

1 **II. MUR 5440**

2 **A. INTRODUCTION**

3 The complaint alleges that New Democrat Network and Simon Rosenberg, in his official
4 capacity as treasurer ("NDN"), made and failed to report excessive contributions to John Kerry
5 for President, Inc. and Robert Farmer, in his official capacity as treasurer ("Kerry for President"),
6 and DNC Services Corporation/Democratic National Committee and Andrew Tobias, in his
7 official capacity as treasurer ("DNC"), in the form of coordinated communications under
8 11 C.F.R. § 109.21. Specifically, the complainant alleges that NDN engaged in coordinated
9 communications through the activities of Bill Richardson and Harold Ickes. Compl. at 26-27 and
10 31-32. The complaint, the responses to it, and the public record, however, contain insufficient
11 information to warrant an investigation into whether NDN's communications were made in
12 cooperation, consultation, or concert with, or at the request or suggestion of Kerry for President
13 or the DNC.

14 Under the Federal Election Campaign Act of 1971, as amended ("the Act"), payments for
15 coordinated communications are made for the purpose of influencing a federal election,
16 constitute in-kind contributions to the candidates or committees with whom or which they are
17 coordinated, and must be reported as expenditures made by those candidates or committees. See
18 11 C.F.R. § 109.21(b)(1). Communications are coordinated with a candidate, an authorized
19 committee, a political party committee, or agent⁷ thereof if they meet a three-part test: (1) the
20 communication is paid for by a person other than a candidate, authorized committee, political
21 party committee, or agent thereof; (2) the communication satisfies at least one of the four content

For the purposes of this section of the regulations, an "agent" is defined as "any person who has actual authority, either express or implied, to engage in any of" a number of defined activities relating to the creation or production of a communication. See 11 C.F.R. § 109.3.

standards described in 11 C.F.R. § 109.21(c);⁸ and (3) the communication satisfies at least one of the six conduct standards described in 11 C.F.R. § 109.21(d).⁹

B. ANALYSIS

(1) Alleged Coordination with Kerry for President

The complaint alleges that NDN engaged in coordinated communications with Kerry for President through the activities of Bill Richardson and Harold Ickes. *See* Compl. at 26-27, 31-32. According to the complaint, Bill Richardson was the chair of the Democratic National Convention and was an “advisor” to NDN, which ran Spanish-language advertisements that attacked or opposed President Bush during the 2004 cycle. *See id.*; *see also* NDN Resp. at 2-3. Harold Ickes, the founder and President of The Media Fund, was a member of the DNC’s Executive Committee and allegedly “coordinate[d] with New Democrat Network.” Compl. at 27 and 59.

The allegations in the complaint satisfy the first two elements of the coordinated communications test under 11 C.F.R. § 109.21 but fail to provide a basis to investigate whether the conduct standard was met. Besides simply stating that Richardson was an “advisor” to NDN, the complaint fails to allege the type of conduct in which he engaged. *See* NDN Resp. at 2. Similarly, with respect to Ickes, the complaint asserts that his organization, TMF,

⁸ The content standards include: (1) electioneering communications; (2) public communications that disseminate campaign materials prepared by a candidate; (3) communications that expressly advocate the election or defeat of a clearly identified federal candidate; and (4) certain public communications distributed 120 days or fewer before an election, which refer to a clearly identified federal candidate (or political party). *See* 11 C.F.R. § 109.21(c).

⁹ Any one of six conduct standards will satisfy the third element of the three-part coordination test, whether or not there is agreement or formal collaboration. *See* 11 C.F.R. §§ 109.21(d) and 109.21(e). These conduct standards include: (1) communications made at the request or suggestion of the relevant candidate or committee; (2) communications made with the material involvement of the relevant candidate or committee; (3) communications made after substantial discussion with the relevant candidate or committee; (4) specific actions of a common vendor; (5) specific actions of a former employee; and (6) specific actions relating to the dissemination of campaign material. *See* 11 C.F.R. §§ 109.21(d)(1)-(6).

1 "coordinate[d]" with NDN, but it does not allege how such conduct is related to conduct
2 involving a candidate, authorized committee, political party committee, or an agent of any of the
3 foregoing under 11 C.F.R. § 109.21(d).

4 Based on the above, the Commission finds there is no reason to believe that NDN
5 violated the Act by making and failing to report excessive contributions to Kerry for President in
6 the form of coordinated communications.¹⁰

7 (2) Alleged Coordination with the DNC

8 The complaint alleges that coordination occurred between NDN and the DNC based on
9 the activities of Bill Richardson, who was the chair of the 2004 Democratic National Convention
10 at the same time he served as an "advisor" to NDN. See Compl. at 26-27, 31-32, and 59.

11 Neither the complaint nor the available information, however, provides information suggesting
12 that Richardson's activities at NDN met any conduct standard, and his role as Chair of the
13 Democratic National Convention appears to be insufficient to connect any activity between the
14 DNC and NDN that would satisfy any conduct standard.

15 Based on this information, there is no reason to believe that NDN violated the Act
16 by making and failing to report excessive contributions to the DNC in the form of coordinated
17 communications.

¹⁰ Although the investigation revealed that NDN was not structured as a political committee with federal and nonfederal accounts during the 2004 cycle, the Commission finds no reason to believe that NDN made excessive, rather than prohibited, contributions.